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IN THE

Supreme Court of the United States

October Term, 1960

No. 486

DANTE EDWARD GORI,

Petitioner,

—against—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, Dante Edward Gori, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on July 22, 1960, affirming petitioner's conviction on his retrial in the United States District Court for the Eastern District of New York after an earlier declaration of mistrial, for having knowingly received and possessed goods stolen in interstate commerce in violation of 18 U.S.C. 659.

Opinions Below

The opinion of the District Court denying petitioner's motion to dismiss the information on the plea, *inter alia*, of former jeopardy (R. 24a-26a) has not been reported;

it appears as Appendix A to this petition, *infra*, pp. 1a-4a. The District Court wrote no other opinion. The opinions of the Court of Appeals affirming the conviction on retrial (R. 45a-61a) have not yet been reported; they appear as Appendix B to this petition, *infra*, pp. 5a-23a. The *per curiam* opinion of the Court of Appeals denying petitioner's petition for a rehearing (R. 84a-86a) has likewise not yet been reported; it appears as Appendix C to this petition, *infra*, pp. 24a-26a.

Jurisdiction

The judgment of the Court of Appeals was entered on July 22, 1960 (R. 62a). Its order denying the petition for rehearing duly filed was entered on August 18, 1960 (R. 87a). On September 15, 1960, Mr. Justice Harlan extended the time within which this petition might be filed to October 17, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

Questions Presented

1. Whether a defendant in a criminal case in the Federal courts may constitutionally be subjected to the jeopardy of a second trial where his earlier trial for the same offense terminated in a mistrial declared without his request or consent and:

   (a) where the record discloses no "manifest necessity" for the declaration of mistrial;

   (b) where there is in fact no "manifest necessity" for the declaration of mistrial; and

(c) where the trial judge believes that the prosecutor is about to engage in misconduct and abruptly declares a mistrial in the presence of the jury presumably in order to protect the rights of the defendant although the defendant is not consulted.

2. Whether the authority of the district judge to declare a mistrial, without the bar of former jeopardy attaching, is a discretionary authority reviewable by the appellate courts or an absolute and unreviewable authority.

3. If the authority is a discretionary authority, whether the declaration of a mistrial by the district judge in this case was in his sound discretion.

4. Whether the misconduct of a prosecutor can, in any event, constitute such "manifest necessity" for the declaration of a mistrial by a district judge as to preclude the bar of former jeopardy attaching, where the defendant neither requests nor consents to the mistrial.

5. If so, whether such a declaration of a mistrial because of the misconduct of the prosecutor and without the request or consent of the defendant deprives him of the right to effective assistance of counsel guaranteed by the Sixth Amendment.

6. Whether the sudden and abrupt declaration of mistrial by the district judge in this case without consulting the defendant or permitting his counsel to speak to it violated the guarantee of effective assistance of counsel provided by the Sixth Amendment and barred the subsequent retrial of the defendant.

7. Whether the failure of a defendant formally to object to the district judge's abrupt declaration of a mistrial, in the presence of the jury and without first consulting or inviting the expression of opinion by the defendant, constituted a waiver by the defendant of his right to be free from subjection to double jeopardy for the same offense.

8. Whether, in the following circumstances, a Court of Appeals properly employed the *in banc* procedure for disposition of appeals provided in 28 U.S.C. 46(c):

(a) oral argument of the appeal was heard initially by a court consisting of a panel of three judges;

(b) in conference, two of the judges voted for reversal of the conviction and one for affirmance;

(c) a majority of the active judges of the Circuit thereupon voted to dispose of the appeal *in banc* and, without advice to the defendant-appellant or further oral argument or briefs, disposed of the appeal *in banc*;

(d) in the course of such *in banc* disposition, one of the originally constituted court, having served by statutory designation, was "disenfranchised" and his earlier vote for reversal of the conviction not considered;

(e) the conviction was affirmed by four of the members of the *in banc* court, one judge dissenting; and

(f) the defendant's subsequent request for reargument to and the filing of new briefs with the entire *in banc* court was denied.

9. Whether, in those circumstances, the *in banc* procedure employed to dispose of this case contravenes the due process requirements of the Constitution.

Constitutional Provisions and Statute Involved

The constitutional provisions involved are the Fifth and Sixth Amendments.

The following provisions of 28 U.S.C. 46(c) (June 25, 1958, c. 646, 62 Stat. 871) are also involved:

> "Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit."

Statement of the Case

Petitioner, charged with having knowingly received and possessed goods stolen in interstate commerce in violation of 18 U.S.C. 659, was placed on trial before a jury in the United States District Court for the Eastern District of New York on February 4, 1959.[1] The Government proceeded

[1] The information was in one count; it charged petitioner and one Franklin Osborne Corbett with having received and having had in their possession twenty-two cases of women's and children's gloves known to be stolen. Corbett pleaded guilty, and petitioner not guilty. The opening trial statement of petitioner's counsel disclosed that petitioner would claim that he had acted without knowledge that the goods in question were stolen and only as Corbett's hired employee (R. 5a, 8a).

with its case during the morning and early afternoon of that day. In the afternoon, during the examination of the Government's fourth witness, FBI Special Agent Deery, and without affording either party an opportunity to address himself to the propriety of such action, the district judge *sua sponte* declared a mistrial "because of the conduct of the district attorney" (R. 20a-22a). However, as the court below notes, the record does not "make entirely clear the reasons which led the judge to act" (Appendix B, *infra*, p. 9a). The colloquy immediately preceding the declaration of mistrial appears in the margin.[2]

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[2] PATRICK JOSEPH DEERY, a witness called on behalf of the Government, having been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Passalacqua:

"Q. Mr. Deery, how long have you been an agent of the F.B.I.? A. Approximately eight and a half years.

"Q. Do you know the defendant Gori? A. Yes, sir, I do.

"Q. Do you know the co-defendant Corbett, who is not on trial today? A. Yes, sir.

"Q. When did you see the defendant Gori for the first time? A. February 10, 1958.

"Q. At about what time? A. Late in the evening, six o'clock.

"The Court: Please keep your voice up.

"The Witness: Yes, sir.

"Q. Were you alone or were you with another agent? A. No, I was with other agents.

"Q. Where did you see the defendant? A. I saw him in his automobile in the lower part of Manhattan, or Brooklyn. We observed his automobile at that time.

"Q. Do you recall the type of automobile he had? A. Yes, he had a—

"The Court: Mr. Passalacqua, please do not get immaterial evidence in here. I admonish you not to. Did you have a talk with him, yes or no?

"Mr. Passalacqua: Your Honor, will you please allow me—

"The Court: No, I won't allow you to try your case your way, because if you try it your way, we are going to have another mistrial.

"Mr. Passalacqua: Your Honor, I think—please allow me—

After the mistrial, petitioner moved to dismiss the information on the plea of former jeopardy (R. 10a-11a). That motion, however, was denied, and petitioner subjected to retrial on the same information before another judge and jury.[3] Petitioner reasserted his plea of former jeopardy.

"The Court: I will give you the whole field. When I think you ought to stop, I will stop you. Go ahead, you try your case your own way.

"Mr. Passalacqua: Thank you.

"Q. Did you observe the defendant on February 11, 1958?

"The Court: Excluded.

"Mr. Gottesman: Objection.

"A. Yes.

"Q. When did you see the defendant Gori for the first time?

"Mr. Gottesman: Objection.

"The Court: That has already been answered, February 10th.

"Q. When did you see him for the second time? A. February—

"The Court: Excluded. You haven't even proved he saw him the second time.

"Q. Did you see him after February 10, 1958? A. Yes, I did.

"Q. Was he alone? A. He met another individual.

"Q. Where did you see him on February 11th—

"The Court: If you ask one more question that alludes to suspicion, I will withdraw a juror and put this case over to January of next year. Now, I want this crime proved, not nine others.

"Mr. Passalacqua: I am not referring—

"The Court: That is exactly what you are going to lead this jury to believe. These agents are helpless. They have got to—Juror No. 1, step out. I declare a mistrial and I don't care whether the action is dismissed or not. I declare a mistrial because of the conduct of the district attorney.

"Mr. Passalacqua: I am not—

"The Court: You heard me. I don't want any more district attorneys coming down here telling me how I am going to try the cases. And tell your chief if he doesn't want to put any more cases on before me, it is all right with me. That's all" (R. 20a-22a).

[3] Although the opinion denying the motion for dismissal was filed on March 26, 1959, the order was entered on that opinion only on July 22, 1959 (R. 38a), several months after the entry of the judgment of conviction on the retrial (R. 36a-37a).

The case was nevertheless submitted to the jury, and a verdict of guilty returned. On April 30, 1959, the judgment of conviction was entered and petitioner sentenced to imprisonment for a term of three and one-half years (R. 36a-37a).

Appeals were thereupon taken from the judgment of conviction and the order denying the motion to dismiss the information (R. 39a, 40a). The appeals were heard together before a panel of the Court of Appeals consisting of Judges Clark, Waterman and Lewis (the latter, a judge of the Tenth Circuit, sitting pursuant to statutory designation). In conference, Judges Waterman and Lewis voted to reverse and Judge Clark to affirm. Draft opinions reflecting that disagreement were then circulated among the active judges of the court. Although Judge Clark disagreed, noting that the procedure appeared "not to be a settled practice in other circuits", a majority of the active judges voted for an *in banc* disposition of the appeals, "superseding the judgment" of Judge Lewis (Appendix B, *infra*, p. 6a fn. 1). On July 22, 1960, four active judges voting to affirm, Judge Waterman dissenting and Judge Lewis no longer participating, the Court handed down its judgment affirming petitioner's conviction (R. 62a).

The majority of the court was of the opinion that, although "the prosecutor did nothing to instigate the declaration of a mistrial and . . . was only performing his assigned duty under trying conditions", although the record does not "make entirely clear the reasons which led the judge to act", and although "the judge should have awaited a definite question which would have permitted

a clear-cut ruling . . . [and] was thus over-assiduous, . . . it seems clear that he was acting according to his convictions in protecting the rights of the accused" (Appendix B, *infra*, pp. 9a-10a). It concluded therefore that, notwithstanding that petitioner neither requested a mistrial nor actively and expressly consented thereto, petitioner was not so placed in jeopardy by the first trial as to preclude retrial and conviction for the same offense. Judge Waterman dissented, pointing out that, even on the rationale of the majority's opinion, the district judge's declaration of mistrial constituted an abuse of discretion and insisting further that "misconduct by a prosecuting attorney during trial may not deprive a defendant without his consent of the right to have that trial completed" (*Id.* 18a-19a).

A petition for rehearing was filed on the grounds, *inter alia*, that the *in banc* procedure as here applied was improper and that the court was mistaken on the issue of double jeopardy. That petition was denied by *per curiam* opinion on August 18, 1960 (Appendix C, *infra*, pp. 24a-26a).

Reasons for Granting the Writ

This case presents questions, never before submitted to this Court, whose resolution is vital to the administration of justice in the Federal courts. Of primary significance are the questions as to the scope of the constitutional inhibition against double jeopardy in cases of retrial after earlier declarations of mistrial. Those important issues led the Court of Appeals to consider this case *in banc*, and their difficulty is reflected in the sharp disagreement among

the judges below.[4] Also significant are the questions as to the propriety of the *in banc* procedure below; the urgency of such questions is accentuated by the fact that a defendant's constitutional rights are involved.

1. There is first the important question whether a defendant in the Federal courts may constitutionally be subjected to the jeopardy of a second trial where he was once put to trial before a jury for the same offense and, without "manifest necessity" or his request or consent, a mistrial was abruptly declared.

The basic rules are plain: "This Court, as well as most others, has taken the position that a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again. *Wade* v. *Hunter*, 336 U. S. 684; *Kepner* v. *United States*, 195 U. S. 100, 128". *Green* v. *United States*, 355 U. S. 184, 188. "At the same time jeopardy is not regarded as having come to an end so as to bar a second trial in those cases where 'unforeseeable circumstances . . . arise during [the first] trial making its completion impossible, such as the failure of a jury to agree on a verdict'. *Wade* v. *Hunter*, 336 U. S. 684, 688-689." *Green* v. *United States, supra*, at 188. In such a situation, "when particular circumstances manifest a necessity for so doing, and when failure to dis-

[4] The opinion below notes that the majority of the court voted for an *in banc* disposition of the case because they believed that it "presented a general problem important to the administration of justice in this circuit . . ." (Appendix B, *infra*, p. 15a). In our view, the questions it involves are significant for *all* Federal courts. The Second Circuit court handles a large number of the criminal appeals in the Federal system. See Administrative Office of the United States Courts, Annual Report of the Director, Sept. 1960, Table B1.

continue would defeat the ends of justice" (*Wade* v. *Hunter, supra,* at 690), a trial may be discontinued and the defendant retried without running counter to the Fifth Amendment's provision as to double jeopardy. See, e.g., *Simmons* v. *United States,* 142 U. S. 148; *Thompson* v. *United States,* 155 U. S. 271; *Wade* v. *Hunter, supra.*

The decision below, however, would enlarge the trial judge's discretion in such situations far beyond the limitations imposed by this Court, indeed to such an extent as virtually to emasculate the constitutional provision. For the retrial in this case has been countenanced despite the fact that the record discloses no necessity whatever for the mistrial.

The majority below confesses that it is unable to justify the district judge's action. The colloquy attending the declaration of mistrial, it says, "demonstrates that the prosecutor did nothing to instigate the declaration of a mistrial and that he was only performing his assigned duty under trying conditions" (Appendix B, *infra,* p. 9a). There is nothing in the transcript which suggests the contrary. "Nor does it make entirely clear the reasons which led the judge to act . . ." (*Ibid.*). Moreover, even if the intention was "to prevent the prosecutor from bringing out evidence of other crimes by the accused",[5] "the judge should have awaited a definite question which would have permitted a clear-cut ruling" (*Id.* 9a-10a).

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[5] As hereinafter noted (*infra,* pp. 16 *seq.*), even if the prosecutor were guilty of misconduct, it is questionable whether a mistrial declared by reason of such misconduct and without the consent of the defendant would permit his subjection to the jeopardy of a second trial. This is another important question presented by Judge Waterman's dissent.

In short, there is no rational basis in the record for the mistrial. As Judge Waterman, dissenting, remarks: "The action of the district judge in ordering the mistrial, expressly characterized as 'over-assiduous' and 'over-zealous', is thus clearly regarded by my colleagues as having been a mistaken action" (*Id.* 19a).

In such circumstances, how can one rationally derive from this record that "manifest necessity" for discontinuance of trial which alone (so this Court has held) permits a retrial of a defendant without violating the provision as to double jeopardy?

To say, as does the majority below, that the judge must not be disturbed in the "control of his courtroom" and in his responsibility "to protect the interests of the litigants . . . [and] to preserve proper respect for federal law administration" is, in light of the record here, to indulge in irrelevant abstraction. Many years ago, in *United States* v. *Perez*, 9 Wheat. 579, this Court recognized the authority of Federal judges "to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated" (*Id.* 580). But the Court simultaneously announced that, in exercising that authority, the judges must "exercise a sound discretion on the subject" and it admonished that "the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes . . ." (*Ibid.*).

A "sound discretion" is, of course, a judicial discretion, "proceeding upon ascertained facts according to rules of

law, and subject to review for apparent errors." *Barry* v. *Edmunds*, 116 U. S. 550, 566; *National Ben. Life Insurance Co.* v. *Shaw-Walker Co.*, 111 F. 2d 497, 507 (D. C. Cir), cert. den. 311 U. S. 673; *Davis* v. *Peerless Insurance Co.*, 255 F. 2d 534, 536 (D. C. Cir.). Meaningful review contemplates some articulation by the district judge of the rationale underlying his declaration of mistrial. Cf. *Virginian Ry.* v. *United States*, 272 U. S. 658, 674-675; *S.E.C.* v. *Chenery Corp.*, 318 U. S. 80; *S.E.C.* v. *Chenery Corp.*, 332 U. S. 194, 196.

Here, however, we cannot know why the district judge thought a mistrial appropriate. The record is silent, and the Court of Appeals supplies no rational justification. The trial transcript suggests that the judge may have believed the prosecutor was *about to* ask a question prejudicial to the defendant. That anticipated event, however, never did occur, and the district judge's action, so far as the record discloses, was quite unnecessary.

In such circumstances, it will not do to sustain the district judge's action because "it seems clear [to the majority of the court below] that he was acting according to *his* convictions in protecting the rights of the accused" (Appendix B, *infra*, p. 10a, emphasis supplied). The subjective predilections or convictions, the "personal and private notions" of judges are irrelevant to the adjudication of personal constitutional rights. Cf. *Rochin* v. *California*, 342 U. S. 165, 170. Only "manifest necessity" justifies terminating one trial and putting a defendant to a second for the same offense.

Nevertheless, finding no rational basis for the district judge's declaration of mistrial, the court below resorts to

divination and faith. It abdicates its duty of effective review and its responsibility to insure defendants against double jeopardy. It vests the district judge in effect with absolute authority to declare a mistrial and to subject a defendant to retrial without regard to necessity, let alone "manifest necessity", for doing so. "Sound discretion" thus gives way to absolute power.

Brock v. *North Carolina*, 344 U. S. 424, on which the court below relies, hardly sanctions the ruling in this case. The Court there did speak of a "discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be best served" (344 U. S. at 427). It did not say, however, that the district judge's measure of what will serve justice is final and indisputable. In *Brock*, the appellate courts could readily examine into the trial judge's exercise of discretion, for the record plainly revealed the basis for his action—a temporary unavailability, by reason of pleas against self-incrimination, of testimony vital to the prosecution. In our case, contrariwise, the appellate courts cannot effectively review the judge's declaration of a mistrial, for we are not informed of the basis for his action. Furthermore, *Brock* involved state, not Federal, action and thus did not raise the question of double jeopardy under the Fifth Amendment, "as the Fifth Amendment applies only to Federal jurisdictions" (*Id.* 426). See *Bartkus* v. *Illinois*, 359 U. S. 121.

The opinion of the Ninth Circuit in *Cornero* v. *United States*, 48 F. 2d 69, appears more consonant with constitutional principle and the prior pertinent opinions of this Court than does the opinion of the majority below. In *Cornero*, the court, in part, says (48 F. 2d at 71):

> "We are here dealing . . . with a fundamental right of a person accused of crime, guaranteed to him by the Constitution, and such right cannot be frittered away or abridged by general rules concerning the importance of advancing public justice."

A trial judge who remains sensitive to the constitutional provision on double jeopardy and consequently hesitant to discharge a jury except in a case of urgent necessity does not on that account become a "mere automaton or referee" or compromise his "responsibility for the conduct of a criminal trial" (Appendix B, *infra*, p. 13a).[6] In any event, as Judge Waterman says, "the maintenance of a court's authority and of a trial judge's control of a trial cannot be had at the expense of a defendant's constitutional rights" (Appendix B, *infra* p. 21a).

The question of which we have here been speaking—whether a defendant may be subjected to the jeopardy of a second trial where a previous trial for the same offense has ended in a mistrial declared apparently without manifest necessity and without the defendant's request or consent—is an important question of Federal law which has not been, but should be, settled by this Court. In sustaining petitioner's conviction on such a retrial, the court below so far sanctioned a departure by the district court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Moreover, the fundamental divergence of opinion which is

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[6] It is notable that the district judge whose declaration of mistrial is sustained below as required by "the ends of justice" was himself far from certain that his action was so urgent as to warrant a second trial. Discharging the jury, the judge said, in part (R. 22a):

> ". . . I declare a mistrial and *I don't care whether the action is dismissed or not* . . ." (emphasis supplied).

articulated in the ruling below and that of the Ninth Circuit in *Cornero* v. *United States*, *supra*, reflects a conflict between the two circuits which requires resolution by this Court.

2. This case presents a second important question of Federal law: whether a prosecutor's misconduct can *in any event* justify a mistrial and a second trial for a defendant in the Federal courts. Judge Waterman's conclusion that it cannot furnishes one of the bases for his dissent. The ruling below that a trial may be discontinued and a defendant put to the jeopardy of a second trial, without his request for or consent to a mistrial and solely by reason of the prosecutor's misconduct (or the trial judge's mistaken notion that such misconduct was about to occur), raises a serious and fundamental question affecting a defendant's rights, which this Court has never resolved.

The court below absolved the prosecutor in this case from any charge of misconduct:

> ". . . the prosecutor did nothing to instigate the declaration of a mistrial and . . . he was only performing his assigned duty under trying conditions" (Appendix B, *infra*, p. 9a).

Yet it sustained the judge's declaration of a mistrial and sanctioned petitioner's retrial, apparently on the rationale that the judge's action was to be condoned because he *believed* he was protecting petitioner's rights from misconduct by the prosecutor.

Judge Waterman succinctly states the question this ruling presents (Appendix B, *infra*, p. 19a):

> "Even if all other questions in the law of former jeopardy remain unsettled it is clear that in the one

> case where the trier of fact has fully considered the evidence against a defendant and the defendant has been acquitted that man may not thereafter be prosecuted for the same offense. . . . As a corollary, a prosecuting attorney, sensing that the trier of fact will acquit if the case being tried is completed, may not enter a 'nolle prosequi' during the trial without the bar of former jeopardy attaching. . . . Therefore, what the prosecuting attorney is forbidden to do directly by nolle he ought not to be permitted to do indirectly by way of trial misconduct. I would hold that misconduct by a prosecuting attorney during trial may not deprive a defendant without his consent of the right to have that trial completed."

This Court has permitted the retrial of defendants after earlier mistrials, finding "manifest necessity" for the earlier trials' discontinuance, in cases where a jury has been unable to agree upon a verdict (*United States* v. *Perez*, 6 U. S. 194; *Keerl* v. *Montana*, 213 U. S. 135; *Logan* v. *United States*, 144 U. S. 263, 298; *Dreyer* v. *Illinois*, 187 U. S. 71); where an urgent military situation has forced a suspension of a court martial hearing (*Wade* v. *Hunter*, 336 U. S. 684); where a jury admittedly has read an inflammatory and prejudicial letter concerning the case (*Simmons* v. *United States*, 142 U. S. 148); where, during a trial, a juror has been found disqualified by reason of his service on the grand jury which had returned the indictment (*Thompson* v. *United States*, 155 U. S. 271); where it has been discovered, after the jury has been impaneled, that the defendant had not been arraigned and, after his arraignment, the identical jury has immediately been reimpaneled (*Lovato* v. *New Mexico*, 242 U. S. 199); and where the trial judge has rescinded an order of consolidation and the same jury has been reimpaneled to try one of the severed

indictments (*Ex Parte Bigelow*, 113 U. S. 328). It has, however, never held the misconduct of a prosecutor sufficient justification for mistrial and subsequent retrial, absent request or consent by the defendant for the mistrial. Nor, so far as we are able to ascertain, has any of the lower Federal courts sanctioned such a departure from the guarantee against double jeopardy. Cf. *United States* v. *Whitlow*, 110 F. Supp. 871 (D.D.C.).

The vice of permitting a district judge to terminate a trial because of a prosecutor's misconduct and thereafter to subject the defendant to a second trial for the same offense is twofold: (1) it permits, if indeed it does not encourage, an ineffective prosecutor or one whose case appears weak to provoke the declaration of mistrial and thus to secure the advantage of a fresh start; and (2) it deprives an accused of that effective assistance of counsel which the Sixth Amendment guarantees him.

The prosecutor is victim to the foibles of all men. He is unfortunately too often intent on securing conviction rather than on assuring a fair trial. See, *e.g.*, *Napue* v. *Illinois*, 360 U. S. 264, 269-270, and cases cited. If his case proves weak or the jury unsympathetic and he believes he can secure a mistrial and retrial whether or not defendant's counsel consents, he will be prone to indulge in misbehavior to provoke a declaration of mistrial. Undoubtedly, it is that consideration which, as Judge Waterman points out (Appendix B, *infra*, p. 20a), has led courts to sanction retrials generally only where the factors inspiring them have been within the control of others than the prosecution. "This prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discon-

tinuing the trial when it appears that the jury might not convict." *Green* v. *United States*, 355 U. S. 184, 188. As Mr. Justice Frankfurter said, concurring, in *Brock* v. *North Carolina*, *supra*, 344 U. S. at 424:

> "A State falls short of its obligation when it . . . prevents a trial from proceeding to a termination in favor of the accused merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time."

The majority below insists, however, that to prevent a district judge from declaring a mistrial for a prosecutor's misconduct except at the risk of permitting the accused to go free would be to deprive the judge of control of his courtroom and to prevent him from preserving proper respect for Federal law administration. This philistine readiness to sacrifice personal constitutional rights to amorphous public interest is unfortunate. If the public interest demands that a mistrial be declared, it may be necessary to do so, but, we insist, not at the expense of the defendant; the Government must choose which interest it will satisfy. Cf. *United States* v. *Andolschek*, 142 F. 2d 503, 506 (2d Cir.).

In any event, the problem can readily be solved by inviting defendant's counsel to move for a mistrial. In such case, of course, defendant, if he consents, will be held to have waived the guarantee against double jeopardy and will not be heard to object to a new trial. In the instant case, however, the district judge completely ignored defendant; he did not deign even to consult with defendant's counsel. Angered by the anticipation of misconduct by the prosecutor, the judge declared the mistrial abruptly and in the presence of the jury and discharged the jury without

affording defendant's counsel an opportunity to speak. By so doing, the trial judge plainly violated the strictures of the Sixth Amendment.

The assistance of counsel guaranteed by the Sixth Amendment means the *effective* assistance of counsel. See, e.g., *Powell* v. *Alabama*, 287 U. S. 45, 68-71; *Neufield* v. *United States*, 118 F. 2d 375 (D.C. Cir.). The dramatic suddenness of the mistrial declaration here, however, precluded any expression of opinion on defendant's behalf; indeed, defendant and his counsel were not even accorded an opportunity to confer. It may be a trial judge's prerogative, as the majority below says (Appendix B, *infra*, p. 13a), to "retain control of his courtroom"; it is not his prerogative, as the majority seemingly asserts, to control the conduct of the defendant's case. As Judge Waterman stated (*Id.* 21a), "the district judge must give the defendant the right to decide whether his interests will be better protected by having a new trial or by proceeding with the present one. The defendant here was denied that choice; his retrial should not be permitted."

3. The decision below is in part posited upon a finding that petitioner waived his constitutional right not to be subjected to double jeopardy. In this respect, the ruling raises a further important question of Federal law; plainly conflicts with the decision of the Ninth Circuit Court in *Himmelfarb* v. *United States*, 175 F. 2d 924, cert. den. 338 U. S. 860; and so departs from the traditionally strict construction accorded waivers of constitutional rights as to call for correction by this Court.

Judge Waterman's dissent here again is persuasive argument for the urgency of review by this Court. Noting that

his colleagues on the Court of Appeals apparently derived a waiver from the facts that, during the course of the earlier trial, petitioner's counsel made objections which might have led to the mistrial order and that petitioner's counsel did not protest the order itself, Judge Waterman replies (Appendix B, *infra*, p. 22a):

> "As to the first ground, objections to testimony cannot be said to constitute consent to a subsequent mistrial order, for objections to testimony obviously assume that the trial is to continue. Moreover, as a matter of policy, I oppose a rule that would inhibit defense counsel from making objections during a trial lest, by objecting, counsel be found to have consented, in advance, to a mistrial order. Finally, I think the part the defendant's objections played in leading to the mistrial order in the present case has been over-emphasized in the court's opinion.
>
> "As to the contention that consent may be implied from appellant's failure to object to the mistrial order, similar contentions were made and rejected in *Himmelfarb* v. *United States*, 175 F. 2d 924, 931-32 (9 Cir. 1949), *cert. denied*, 338 U. S. 860; *Ex parte Glenn*, 111 Fed. 257, 259 (N.D. W. Va. 1901), *rev'd on other grounds*, 189 U. S. 506; United States v. Watson, 28 Fed. Cases No. 16,651 (SDNY 1868). Under different circumstances than here present one court may have implied consent from a failure to object to a mistrial order. In *Scott* v. *United States*, 202 F. 2d 354 (D.C. Cir. 1952), *cert. denied*, 344 U. S. 879, 881, during the absence of the jury but in the presence of the defendant and his attorney, the trial judge stated he had decided to declare a mistrial. The jury was then called back into the courtroom and the order announced. During this time no objection was made. In the present case, however, the

> possibility of a mistrial had not been suggested until almost immediately before the district judge angrily ordered a juror discharged. The suddenness and vehemence of the order renders it highly unrealistic for us to imply consent here from appellant's failure to protest."

In view of the suddenness of the district judge's action, the fact that the mistrial declaration occurred in the presence of the jury, and the consequent futility of speaking to it, it is startling to find the court inferring consent from petitioner's mere passive "acquiescence" in the trial judge's abrupt ruling. Certainly the decision is in striking conflict with the ruling of the Ninth Circuit in *Himmelfarb* v. *United States, supra,* where the court said, in part (175 F. 2d at 931):

> "The mere silence of an accused or his failure to object or to protest a discharge of the jury cannot amount to a waiver of this immunity. 'It would be a harsh rule to hold that defendant consented to a withdrawal of the case from the jury simply because he interposed no objection.' *State* v. *Richardson,* 47 S. C. 166, 25 S.E. 220, 222, 35 L.R.A. 238."

The readiness of the Court of Appeals here to find a waiver of a personal constitutional right is a radical departure from the rule repeatedly enunciated by this Court which raises a strong presumption against waiver of fundamental rights by an accused and requires that such rights be jealously and vigilantly guarded. See *Johnson* v. *Zerbst,* 304 U. S. 458, 464; *Glasser* v. *United States,* 315 U. S. 60, 70; *Von Moltke* v. *Gillies,* 332 U. S. 708, 723.

4. Finally, this case once again brings to this Court questions as to the *in banc* procedures employed by the Second Circuit Court of Appeals. Cf. *United States* v. *American-Foreign Steamship Corp.*, — U. S. —, 80 S. Ct. 1336. This Court's responsibility, in the exercise of its "general power to supervise the administration of justice in the Federal Courts", to define the requirements of such procedures and to insure their observance warrants the grant of a writ in this case. The problem is a procedural one, but the due process requirements of the Constitution give it special cogency in a criminal prosecution.

The majority's opinion below clearly sets forth the pertinent facts. Petitioner's appeal from the judgment of conviction came on for hearing before a panel of the Court of Appeals consisting of Judges Clark and Waterman of that Circuit and Judge Lewis of the Tenth Circuit, sitting pursuant to statutory designation. In conference, Judges Waterman and Lewis voted to reverse, Judge Clark to affirm the conviction. Draft opinions reflecting that disagreement were circulated among the active judges of the court, and a majority of them voted to dispose of the appeal *in banc*. Thereupon Judge Lewis was "disenfranchised," and four of the five active judges voted to affirm the conviction, Judge Waterman persisting in his vote for reversal (Appendix B, *infra*, pp. 6a-7a).

Petitioner was unaware of these intracameral transactions. It was only on July 22, 1960, when the court handed down its opinion, that he learned that an *in banc* court had considered his case and not the panel before whom the appeal had been argued, and that Judge Lewis, one of the panel members, had been excluded.

Dismayed to find his fate determined by a court to whom he had had no opportunity to address argument, petitioner timely filed a petition urging, *inter alia*, that a rehearing be granted, that on such rehearing Judge Lewis participate, and that oral argument be permitted and new briefs received. The court, by *per curiam* opinion, denied that petition for rehearing in all respects (Appendix C, *infra*, pp. 24a-26a).

The Court admitted that, although it had recently adopted its Rule 25(b), dealing with petitions for rehearing *in banc*, it had no rule as to procedure on initial *in banc* hearings. In such a situation, the judges exercised their discretion "in each particular case and . . . kept formal rules to a minimum" (*Id.* 25a). They had "no set rule in this regard, but are guided by what we conclude are the needs of a particular case" (*Id.* 26a). Replying to petitioner's request to be heard by the *in banc* court, before which he had had no opportunity to argue, the court said that petitioner had "no absolute right to oral argument" and that "further briefs and oral argument would have been a barren formalism without advantage to the court and counsel and a waste of time for all concerned." (*Ibid.*)

The manner in which the court thus disposed of petitioner's right to be heard by those who judged him raises serious questions of judicial administration and of due process. We are mindful of the freedom accorded the Federal Courts of Appeals to devise their own administrative machinery in using the *in banc* procedures contemplated by 28 U.S.C. 46(c). *United States* v. *American-Foreign Steamship Corp., supra*, 80 S. Ct. at 1338-1339. But, although this Court has not required the adoption of any particular procedure governing the exercise of that statutory power, it

has directed that "whatever the procedure which is adopted, it should be clearly explained, so that the members of the court and litigants in the court may become thoroughly familiar with it. . . ." *Western Pacific Railroad Case*, 345 U. S. 247, 267. The Second Circuit appears to have ignored that direction, for it has proceeded, so far as initial *in banc* disposition of appeals is concerned, to treat each case on an *ad hoc* basis. We respectfully suggest that this Court's responsibility to supervise the administration of justice in the Federal judicial system therefore requires examination of this case.

Beyond this, and more fundamentally, it is most doubtful whether the *in banc* procedure here employed can be reconciled with due process. It is noteworthy that in the Third Circuit, whose Court of Appeals was the pioneer in developing the procedure, *in banc* consideration of an appeal occurs only after argument before the entire bench. Maris, *Hearing and Rehearing Cases In Banc*, 14 F.R.D. 91, 93. Certainly, an appellant is accorded something less than a due process hearing when he is precluded from presenting his case to all of the judges who will determine it. The unfairness and inequity of such a procedure are compounded by the fact that one of the judges who did hear argument and was persuaded to vote for reversal of the conviction here was ultimately "discharged" from further consideration by the intervention of the *in banc* court. It is significant that Judge Clark, the only member of the original panel who voted for affirmance of the conviction, had serious doubts as to the propriety of the *in banc* procedure and consequently did not vote for it (Appendix B, *infra*, p. 6a, fn. 1).

CONCLUSION

For the foregoing reasons a writ of certiorari should be granted in this case. The decision below radically impairs the constitutional guaranty against double jeopardy. The questions—both with respect to the application of the Fifth Amendment's provision as to double jeopardy and the *in banc* procedure used by the court below in judging this case—are of great moment, have not previously been presented to this Court, and should be settled by it.

Respectfully submitted,

JEROME LEWIS
Attorney for Petitioner

MILTON C. WEISMAN
HARRY I. RAND
Of Counsel

APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Appellee,

—against—

DANTE EDWARD GORI,

Appellant.

Appearances:

NATHAN GOTTESMAN, ESQ.,
Attorney for the Defendant Gori.
For the Motion

CORNELIUS W. WICKERSHAM, JR., ESQ.,
United States Attorney,

BY PETER A. PASSALACQUA, ESQ.,
Assistant U. S. Attorney,
In Opposition.

RAYFIEL, *J.*

This is a motion by the defendant, Dante Edward Gori, for an order dismissing the information herein on the following grounds:

(1) that the information does not state facts sufficient to constitute an offense against the United States,

(2) that the defendant has been placed in double jeopardy in that he was previously tried for the offense charged in said information and a mistrial was declared by the Court due to no fault on the part of the defendant.

The first ground urged is without merit. The information follows generally the language of the statute involved, (440) §659 of Title 18, U. S. Code, and complies in all respects with Rule 7(c) of the Federal Rules of Criminal Procedure.

As to the second ground urged by the defendant, the facts are as follows:—the trial of the case was commenced on February 4, 1959, and on that day, and during the presentation of the Government's case, the trial judge, apparently believing that certain questions asked of Government witnesses on direct examination were or might be prejudicial to the defendant, sua sponte exercised his prerogative and declared a mistrial. Though not sought by the defendant, the mistrial was obviously declared in his interest, and was not based on the kind of jeopardy which would bar a second trial herein. The Supreme Court, in the case of Wade vs. Hunter 336 U. S. 684, had occasion to discuss very fully the rule to be applied on this question, and Mr. Justice Black, stated at page 688 that "The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed.

(441) When justice requires that a particular trial be discontinued is a question that should be decided by persons

conversant with factors relevant to the determination. The guiding rule of federal courts for determining when trials should be discontinued was outlined by this Court in United States v. Perez, 9 Wheat. 579. In that case the trial judge without consent of the defendant or the Government discharged the jury because its members were unable to agree. The defendant claimed that he could not be tried again and prayed for his discharge as a matter of right. In answering the claim this Court said at p. 580:

'. . . We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, Courts should be extremely careful how they interfere with any of the chances of life, in (442) favour of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this as in other cases, upon the responsibility of the Judges, under their oaths of office. . . .'

The rule announced in the Perez case has been the basis for all later decisions of this Court on double jeopardy. It attempts to lay down no rigid formula. *Under the rule a*

trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice." (Emphasis added)

The motion is in all respects denied. Submit order.

Dated: March 26, 1959

LEO F. RAYFIEL
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 262—October Term, 1959.

(Argued March 11, 1960 Decided July 22, 1960.)

Docket No. 26048

UNITED STATES OF AMERICA,

Appellee,

—v.—

DANTE EDWARD GORI,

Defendant-Appellant.

Before:

LUMBARD, *Chief Judge*, and

CLARK, WATERMAN, MOORE, and FRIENDLY, *Circuit Judges.*

Appeal from the United States District Court for the Eastern District of New York, Leo F. Rayfiel and Walter Bruchhausen, *Judges.*

Dante Edward Gori appeals from the denial by Judge Rayfiel of his motion to dismiss, on his plea of former jeopardy, an information charging him with having knowingly received and possessed goods stolen in interstate commerce in violation of 18 U. S. C. §659, and from his conviction of the offense charged after trial before Judge Bruchhausen and a jury. Affirmed.

Appendix B

JEROME LEWIS, Brooklyn, N. Y., *for defendant-appellant.*

CORNELIUS W. WICKERSHAM, JR., U. S. Atty., E. D. N. Y., Brooklyn, N. Y. (Margaret E. Millus, Asst. U. S. Atty., Brooklyn, N. Y., on the brief), *for appellee.*

CLARK, *Circuit Judge*:

This appeal, based upon the defendant-appellant's plea of former jeopardy to avoid a criminal conviction, came for hearing before a panel of this court consisting of Judge Waterman and the writer from this Circuit and Judge Lewis of the Tenth Circuit, sitting with us pursuant to statutory designation. In conference the court was in disagreement, Judges Waterman and Lewis voting to reverse and the writer voting to affirm. Draft opinions reflecting this disagreement, together with the briefs, record, transcript, and appendix, were then circulated among the active judges, a majority of whom, believing that the case presented a general problem important to the administration of justice in this circuit, thereupon voted for disposition of the appeal *in banc*, 28 U. S. C. §46(c).[1] Four active

[1] Although disagreeing with the conclusion of the panel majority, the writer did not vote for the *in banc* procedure. In his experience such procedure does not reconcile differences, but in fact accentuates them. Hence it should be reserved for clarifying issues otherwise presented ambiguously or in a one-sided fashion. Here the important issue seemed fully presented, and there was the added difficulty of superseding the judgment of a distinguished visitor who had graciously complied with our request for help. Though we have acted similarly in other cases, it appears not to be a settled practice in other circuits. See, e.g., *National Latex Products Co.* v. *Sun Rubber Co.*, 6 Cir., 276 F. 2d 167.

judges having then voted to affirm, the writer was assigned to prepare an opinion reflecting this prevailing view.

The defendant was charged with having knowingly received and possessed goods stolen in interstate commerce in violation of 18 U. S. C. §659. The trial got under way before Judge Abruzzo on February 4, 1959, after the declaration of a mistrial on the previous day.[2] From the opening by counsel it appeared that the defendant would not contest his receipt and possession of stolen goods on February 11, 1958, with the codefendant Corbett—who pleaded guilty—but would claim that he acted without knowledge of their character and only as Corbett's hired employee. The Assistant United States Attorney attempted to prove this fairly simple case first by the testimony of the shipper's traffic manager, second by the truckman from whose truck the goods were stolen, and third by two FBI Special Agents investigating the theft. He ran into repeated difficulty, however, in part because of continuous formal objections by the defense, but even more by interference on the part of the trial judge, who repeatedly ordered the reframing of questions and otherwise took the conduct of the case away from him. The trial continued its rocky course throughout the morning and early afternoon until upon the examination of the fourth witness, Special Agent Deery, there occurred the colloquy set forth in the margin resulting

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[2] No point was made on this appeal as to this mistrial, which appears to have been granted upon motion of defendant after associate defense counsel was observed talking with one of the jurors.

in the declaration of a mistrial by the judge.[3] Later Judge Rayfiel in a reasoned opinion denied defendant's motion to dismiss the information on plea of former jeopardy, and he was convicted and sentenced to imprisonment after a jury trial before Chief Judge Bruchhausen. He now appeals from both these actions of the district court, but

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[3] "PATRICK JOSEPH DEERY, a witness called on behalf of the Government, having been duly sworn, was examined and testified as follows:

"*Direct Examination by Mr. Passalacqua*:

"Q. Mr. Deery, how long have you been an agent of the F. B. I.? A. Approximately eight and a half years.

"Q. Do you know the defendant Gori? A. Yes, sir, I do.

"Q. Do you know the co-defendant Corbett, who is not on trial today? A. Yes, sir.

"Q. When did you see the defendant Gori for the first time? A. February 10, 1958.

"Q. At about what time? A. Late in the evening, six o'clock.

"The Court: Please keep your voice up.

"The Witness: Yes, sir.

"Q. Were you alone or were you with another agent? A. No, I was with other agents.

"Q. Where did you see the defendant? A. I saw him in his automobile in the lower part of Manhattan, or Brooklyn. We observed his automobile at that time.

"Q. Do you recall the type of automobile he had? A. Yes, he had a—

"The Court: Mr. Passalacqua, please do not get immaterial evidence in here. I admonish you not to. Did you have a talk with him, yes or no?

"Mr. Passalacqua: Your Honor, will you please allow me—

"The Court: No, I won't allow you to try your case your way, because if you try it your way, we are going to have another mistrial.

"Mr. Passalacqua: Your Honor, I think—please allow me—

"The Court: I will give you the whole field. When I think you ought to stop, I will stop you. Go ahead, you try your case your own way.

"Mr. Passalacqua: Thank you.

relies only on the claim of former jeopardy and assigns no error as to his trial before Judge Bruchhausen.

The colloquy set forth in the margin demonstrates that the prosecutor did nothing to instigate the declaration of a mistrial and that he was only performing his assigned duty under trying conditions. This is borne out by the entire transcript, including also that covering the morning session. Nor does it make entirely clear the reasons which led the judge to act, though the parties appear agreed that

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"Q. Did you observe the defendant on February 11, 1958?

"The Court: Excluded.

"Mr. Gottesman: Objection.

"A. Yes.

"Q. When did you see the defendant Gori for the first time?

"Mr. Gottesman: Objection.

"The Court: That has been already answered, February 10th.

"Q. When did you see him for the second time? A. February—

"The Court: Excluded. You haven't even proved he saw him the second time.

"Q. Did you see him after February 10, 1958? A. Yes, I did.

"Q. Was he alone? A. He met another individual.

"Q. Where did you see him on February 11th—

"The Court: If you ask one more question that alludes to suspicion, I will withdraw a juror and put this case over to January of next year. Now, I want this crime proved, not nine others.

"Mr. Passalacqua: I am not referring—

"The Court: That is exactly what you are going to lead this jury to believe. These agents are helpless. They have got to—. Juror No. 1, step out. I declare a mistrial and I don't care whether the action is dismissed or not. I declare a mistrial because of the conduct of the district attorney.

"Mr. Passalacqua: I am not—

"The Court: You heard me. I don't want any more District Attorneys coming down here telling me how I am going to try the cases. And tell your chief if he doesn't want to put any more cases on before me, it is all right with me. That's all."

he intended to prevent the prosecutor from bringing out evidence of other crimes by the accused. Even so, the judge should have awaited a definite question which would have permitted a clear-cut ruling. But if he was thus over-assiduous, pursuing the command role which he had assumed for himself, it seems clear that he was acting according to his convictions in protecting the rights of the accused. The defense now urges that the judge was endeavoring to punish counsel's disobedience, but such a characterization, even if apt, adds nothing significant to his over-all purpose; and as to this the defense elsewhere states, "It is undeniable that the trial court was concerned with protecting the rights of the appellant." It is to be noted that the defendant made the original objections leading to the order of mistrial and that he made or attempted no protest to the order itself, but accepted the benefit of the new trial. We have the issue, therefore, whether active and express consent—something beyond acquiescence—is required to prevent this defendant, now convicted after a concededly fair trial, from receiving absolution for his crime by reason of the overzealousness of the trial judge on his behalf. A majority of this court concludes that the federal law does not so command.

The mandate of the Fifth Amendment to the United States Constitution is "* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *." In considering whether the declaration of a mistrial precludes a subsequent prosecution for the same offense the Supreme Court has rejected any rigid formularization of the constitutional requirement in favor of a flexible application of the prohibition. *Wade* v. *Hunter*,

336 U. S. 684, 690. This approach originated in *United States* v. *Perez*, 22 U. S. (9 Wheat.) 579, 580, where Justice Story stated: "We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere." This controlling principle was succinctly reiterated in *Brock* v. *North Carolina*, 344 U. S. 424, 427:

> "This Court has long favored the rule of discretion in the trial judge to declare a mistrial and to require another panel to try the defendant if the ends of justice will be best served. *Wade* v. *Hunter*, 336 U. S. 684; *Thompson* v. *United States*, 155 U. S. 271, 273-274. As was said in *Wade* v. *Hunter*, *supra*, p. 690, 'a trial can be discontinued when particular circumstances manifest a necessity for so doing, and when failure to discontinue would defeat the ends of justice.' "

To the same effect are *Lovato* v. *New Mexico*, 242 U. S. 199; *Simmons* v. *United States*, 142 U. S. 148; *United States* v. *Cimino*, 2 Cir., 224 F. 2d 274; *United States* v. *Potash*, 2 Cir., 118 F. 2d 54, certiorari denied *Potash* v. *United States*, 313 U. S. 584; *Scott* v. *United States*, D. C. Cir., 202 F. 2d 354, certiorari denied 344 U. S. 879; *United States* v. *Giles*, D. C. W. D. Okl., 19 F. Supp. 1009. It is to be noted that in none of these cases is the element of consent by the accused held necessary to obviate the constitutional bar; in fact, they are authority for the con-

trary view. Actually in several the mistrial had been declared either on the motion of the prosecution or by the court of its own motion, but over the vigorous opposition of the defense; this was the situation in the *Simmons*, *Scott*, and *Giles* cases, as well as in the *Brock* case, which concerned a state conviction reviewed under the Fourteenth Amendment.[4] In yet others, as in *Lovato*, *Cimino*, and *Potash*, it had been declared on the government's or the court's motion, with no showing of express consent by the accused. In all these the ultimate conviction was upheld against the plea of double jeopardy.

The defendant relies on *Himmelfarb* v. *United States*, 9 Cir., 175 F. 2d 924, certiorari denied 338 U. S. 860, as showing the need of consent; but such was not the court's approach there. Accepting the now well settled view that waiver or consent by the defendant barred his later resort to the plea,[5] the court first considered and held ineffective a waiver by counsel without his client's specific assent. Having thus cleared the way, it passed to the "real issue presented," which was "whether or not there was a legal necessity supporting the discharge of the first jury." And this it considered at considerable length with a wealth of learning and citation of authority, con-

[4] So in *Forman* v. *United States*, 361 U. S. 416, where the Court of Appeals had originally reversed a conviction and directed an acquittal, but later modified this to direct a new trial, on motion of the government and against defense objection, the Supreme Court rejected the plea of double jeopardy.

[5] See, e.g., *Blair* v. *White*, 8 Cir., 24 F. 2d 323; *Barrett* v. *Bigger*, D. C. Cir., 17 F. 2d 669, certiorari denied 274 U. S. 752; *United States* v. *Harriman*, D. C. S. D. N. Y., 130 F. Supp. 198, 204, notwithstanding Mr. Justice Holmes' view to the contrary stated in *Kepner* v. *United States*, 195 U. S. 100, 136.

cluding: "We think the court did not abuse its discretion." So the denial of the plea was upheld and the conviction was *affirmed*. To similar effect are cases such as *Ex parte Glenn*, C. C. N. D. W. Va., 111 Fed. 257, reversed on other grounds *Moss* v. *Glenn*, 189 U. S. 506, and *United States* v. *Watson*, D. C. S. D. N. Y., 28 Fed. Cas. No. 16,651. Thus while consent may bar resort to the plea, its absence does not relieve the judge of responsibility and discretion to discontinue a particular trial when justice so requires. *Wade* v. *Hunter*, *supra*, 336 U. S. 684, 689.

The law as thus stated comports more with our fundamental concepts of the federal administration of criminal justice than does the rigid and inflexible rule contended for by the accused. It has been a source of pride federal-wise that a United States district judge is more than a mere automaton or referee and bears an affirmative responsibility for the conduct of a criminal trial. This responsibility is particularly acute in the avoidance of prejudice arising from nuances in the heated atmosphere of trial, which cannot be fully depicted in the cold record on appeal. If the accused retains essentially a power of veto on pain of ban of all prosecution, even though fully justified, it is clear that the judge does not retain control of his courtroom and cannot act as he thinks necessary either to protect the interests of the litigants or to preserve proper respect for federal law administration. Even though there may be a rare case where in retrospect the judge may seem to have been overzealous in his protection of the rights of an accused, we think the law is better served by the preservation of the responsibility which the federal precedents impose upon him.

On this basis we do not believe decision should be difficult, for the responsibility and discretion exercised by the judges below seem to us sound. Here the defendant was in no way harmed by the brief trial which, indeed, revealed to him the prosecution's entire case. He was thus in a position to start anew with a clean slate, with all possibility of prejudice eliminated and with foreknowledge of the case against him. The situation was quite unlike the more troublesome problems found in various of the cases, as where the prosecution desires to strengthen his case on a new start or otherwise provokes the declaration of mistrial, or the court has acted to the prejudice of the accused, or the accused has actually been subject to two trials for essentially the same offense.[6] On the other hand, for the defendant to receive absolution for his crime, later proven quite completely, because the judge acted too hastily

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[6] See full discussion in *United States* v. *Sabella*, 2 Cir., 272 F. 2d 206, and *Green* v. *United States*, 355 U. S. 184, a 5–4 decision where the two opinions are notable for their historical exegesis of the plea. The question in *Green* was as to jurisdiction, after reversal on appeal, to retry the accused for the greater offense of which he had been originally acquitted. But the majority, in sustaining the plea and pointing out that it "prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict," reiterate, 355 U. S. at page 188: "At the same time jeopardy is not regarded as having come to an end so as to bar a second trial in those cases where 'unforeseeable circumstances * * * arise during [the first] trial making its completion impossible, such as the failure of a jury to agree on a verdict.' *Wade* v. *Hunter*, 336 U. S. 684, 688-689." In *United States* v. *Whitlow*, D. C. D. C., 110 F. Supp. 871—a case criticized in 67 Harv. L. Rev. 346 (1953) for inflexibility—the court upheld the plea when the mistrial had been declared because of the misconduct of the defendant's counsel.

in his interest, would be an injustice to the public in the particular case and a disastrous precedent for the future.

I am authorized to say that Chief Judge Lumbard and Judges Moore and Friendly concur in this opinion.

Conviction affirmed.

WATERMAN, *Circuit Judge* (dissenting):

It is quite clear that the district judge, on February 4, 1959, ordered a mistrial because of actions which he believed to constitute trial misconduct on the part of the Assistant United States Attorney.[1] Accordingly, it must first be asked if a mistrial for this reason may be ordered by a district judge, acting entirely *sua sponte*, without giving rise subsequently to valid plea of former jeopardy under the Fifth Amendment. If not, a second question arises: did the defendant here expressly or impliedly request or consent to the mistrial order? I believe that both these questions must be answered in the negative, and therefore I dissent.

The former jeopardy clause of the Fifth Amendment reads as follows: "• • • nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; • • •". The clause consistently has been interpreted not only to forbid multiple punishment for the same offense but also to forbid successive exposures to a single punishment. *United States* v. *Ball*, 163 U. S. 662, 666-71 (1896); *Ex parte Lange*, 18 Wall. (85 U. S.) 163, 169 (1873 Term); and see also *United States* v. *Sabella*, 272 F. 2d 206, 208-10 (2 Cir. 1959). Thus, once a jury has been impaneled

[1] The district judge stated: "I declare a mistrial because of the conduct of the district attorney."

and sworn[2] it is said jeopardy attaches, and if a mistrial is then ordered, subsequent prosecution is barred, *Green* v. *United States*, 355 U. S. 184, 188 (1957); *Bassing* v. *Cady*, 208 U. S. 386, 391 (1908); *McCarthy* v. *Zerbst*, 85 F. 2d 640, 642 (10 Cir. 1936), *cert. denied*, 299 U. S. 610; *Cornero* v. *United States*, 48 F. 2d 69 (9 Cir. 1931); *Ex parte Ulrich*, 42 Fed. 587 (W. D. Mo. 1890), *app. dismissed*, 189 U. S. 789, unless the defendant has consented to the mistrial order, *Blair* v. *White*, 24 F. 2d 323 (8 Cir. 1928); *Barrett* v. *Bigger*, 17 F. 2d 669 (D. C. Cir. 1927), *cert. denied*, 274 U. S. 752; *United States* v. *Harriman*, 130 F. Supp. 198, 204 (S. D. N. Y. 1955). It is settled that a plea of former jeopardy does not lie when a mistrial is ordered because of the jury's inability to reach an agreement after submission, *Keerl* v. *Montana*, 213 U. S. 135 (1909); *Dreyer* v. *Illinois*, 187 U. S. 71, 84-87 (1902); *Logan* v. *United States*, 144 U. S. 263, 297-98 (1892); *United States* v. *Perez*, 9 Wheat. (22 U. S.) 579 (1824 Term), or when a juror is discovered to be incompetent or becomes incapacitated, *Thompson* v. *United States*, 155 U. S. 271 (1894); *Simmons* v. *United States*, 142 U. S. 148 (1891); *United States* v. *Potash*, 118 F. 2d 54 (2 Cir. 1941), *cert. denied*, 313 U. S. 584; *United States* v. *Haskell*, 26 Fed. Cases No. 15, 321 (E. D. Pa. 1823 Term). There are also cases disallowing the plea of former jeopardy when the mistrial order resulted from the courtroom conduct of particular persons.

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[2] In a non-jury case it is stated that jeopardy attaches once the defendant has pleaded and the court has begun to hear evidence. *Clawans* v. *Rives*, 104 F. 2d 240, 242 (D. C. Cir. 1939); *McCarthy* v. *Zerbst*, 85 F. 2d 640, 642 (10 Cir. 1936), cert. denied, 299 U. S. 610.

Appendix B

Prior to this case the prosecuting attorney has not been included in this group. See *United States* v. *Cimino*, 224 F. 2d 274 (2 Cir. 1955) (exclamations of a juror); *Scott* v. *United States*, 202 F. 2d 354 (D. C. Cir. 1952), *cert. denied*, 344 U. S. 879, 881 (withdrawal of associate counsel appointed by the court); *United States* v. *Giles*, 19 F. Supp. 1009 (W. D. Okla. 1937) (exclamations of a trial judge questioning Government's good faith in prosecuting); but cf. *United States* v. *Whitlow*, 110 F. Supp. 871 (D. C. D. C. 1953) (misconduct of defendant's counsel held too minor to nullify plea of former jeopardy). For reasons to be set forth subsequently I am of the opinion that a mistrial ordered because the trial judge believed that the prosecuting attorney was guilty of misconduct presents a different problem than that presented in these cases.

All the cases purporting to be exceptions to the rule that a mistrial may not be ordered without the defendant's consent "once jeopardy has attached" rely upon the authority and rationale of *United States* v. *Perez*, *supra*. There, at page 580, Justice Story said:

> "We think that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very

> plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound and conscientious exercise of this discretion, rests, in this as in other cases, upon the responsibility of the judges, under their oaths of office."

Without in any way disagreeing with the result in the *Perez* case or with the results in the cases which have relied upon it, I submit that as a guide for determining when subsequent prosecution is to be barred by the former jeopardy clause of the Fifth Amendment, Justice Story's discussion in *Perez* is analytically inadequate. If the former jeopardy clause is to be taken seriously as a constitutional right of criminal defendants and if one accepts the principle that jeopardy attaches at the commencement of trial, it defies analysis to hold that this constitutional right can *always* be nullified by some discretionary act on the part of the judge at the first trial.[3] The inadequacy of such a "discretionary" rationale becomes peculiarly apparent in the present case. The majority opinion is at pains to demonstrate the propriety of the Assistant United States Attorney's conduct. They state that the Assistant United States Attorney did nothing to instigate a mistrial, that he merely performed his assigned duties "under trying conditions."

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[3] In *Cornero* v. *United States*, 48 F. 2d 69, 72 (9 Cir. 1931) it was suggested that when the *Perez* opinion referred to the discretion of the trial judge it contemplated the discretion involved in determining how long the jury should be required to deliberate prior to its discharge for having failed to reach a verdict.

Appendix B

The action of the district judge in ordering the mistrial, expressly characterized as "over-assiduous" and "over-zealous," is thus clearly regarded by my colleagues as having been a mistaken action. How then can it be said that the district judge did *not abuse* his discretion in ordering a mistrial? I cannot follow my colleagues on this issue; the result they reach is to me a *non sequitur*. However, my dissent is based upon other grounds, for I believe the question before us should be resolved without any reliance whatever upon amorphous principles of discretion.

Even if all other questions in the law of former jeopardy remain unsettled it is clear that in the one case where the trier of fact has fully considered the evidence against a defendant and the defendant has been acquitted that man may not thereafter be prosecuted for the same offense. *United States* v. *Ball*, 163 U. S. 662, 669-70 (1896). As a corollary, a prosecuting attorney, sensing that the trier of fact will acquit if the case being tried is completed, may not enter a "nolle prosequi" during the trial without the bar of former jeopardy attaching. See *Green* v. *United States*, 355 U. S. 184, 188 (1957); *Cornero* v. *United States*, 48 F. 2d 69, 71 (9 Cir. 1931); *Ex parte Ulrich*, 42 Fed. 587 (W.D. Mo.), reversed on other grounds, 43 Fed. 661 (C.C.W.D. Mo. 1890), *app. dismissed sub nom Ulrich* v. *McGowan*, 149 U. S. 789 (1893); *United States* v. *Shoemaker*, 27 Fed. Cases No. 16,279 (D. Ill. 1840); and cf. Frankfurter, *J.*, concurring, *Brock* v. *North Carolina*, 344 U. S. 424, 428-29 (1953). Therefore, what the prosecuting attorney is forbidden to do directly by nolle he ought not to be permitted to do indirectly by way of trial misconduct. I would hold that misconduct by a prosecuting attorney during trial may not

deprive a defendant without his consent of the right to have that trial completed.

So far as I have been able to discover, of the cases permitting retrial subsequent to a mistrial that had been ordered after the initial trial had begun, in only two have the factors that produced the mistrial order been within the control of the prosecution. These two cases are *Wade* v. *Hunter*, 336 U. S. 684 (1949), *reh'g denied*, 337 U. S. 921, and *Lovato* v. *New Mexico*, 242 U. S. 199 (1916) and neither case contradicts the conclusion expressed in the preceding paragraph. *Wade* v. *Hunter* involved court martial proceedings initiated at the front during the invasion of Germany during the Second World War. There the Court, at pages 691-92, found "extraordinary reasons" justifying adjournment of the first trial. The circumstances of the *Wade* case would appear to objectively preclude any possibility that the adjournment ordered there resulted from a fear that the trier of fact would decide against the prosecution. Similarly, the abuse was objectively impossible under the facts in *Lovato*. There the identical jury which had been discharged so that the defendant could be arraigned prior to trial was reimpaneled to hear the case after the defendant's arraignment.

The references throughout this opinion to "misconduct" on the part of the Assistant United States Attorney should not be taken as indicating that, on this point, I am in accord with the District Judge and, with him, believe that the conduct of the Assistant United States Attorney was improper. I agree with my colleagues that the Assistant United States Attorney attempted conscientiously to present his case in a manner consistent with the rulings of the

district judge. However, the significant fact is the district judge's belief. This erroneous belief deprived appellant of his right to take his case to the jury as the jury was then constituted. It is implicit in the former jeopardy clause that, as in criminal proceedings generally, the injurious consequences of erroneous rulings by the trial judge have to be borne by the prosecution rather than by the defendant.

Furthermore, although we reach contrary conclusions, I agree with my colleagues that the correct disposition of the issue before us does not depend upon whether the district judge was acting to protect the defendant or whether he was acting to punish imagined disobedience. If the former, I maintain that the district judge must give the defendant the right to decide whether his interests will be better protected by having a new trial or by proceeding with the present one. The defendant here was denied that choice; his retrial should not be permitted. If the latter, I think it equally clear that the maintenance of a court's authority and of a trial judge's control of a trial cannot be had at the expense of a defendant's constitutional rights.

I conclude that a district judge, acting *sua sponte*, does not have power to order a mistrial because of trial misconduct by the prosecuting attorney without giving rise to a sustainable plea of former jeopardy should retrial be attempted. Thus it becomes necessary to consider whether this appellant in some manner may be said to have consented to the mistrial order.

Although I find the court's opinion unclear on this point, it may be that my colleagues imply consent from two actions by appellant during the trial. My colleagues mention the

fact that appellant made objections which might have led to the mistrial order, and they also mention that he did not protest the order itself.

As to the first ground, objections to testimony cannot be said to constitute consent to a subsequent mistrial order, for objections to testimony obviously assume that the trial is to continue. Moreover, as a matter of policy, I oppose a rule that would inhibit defense counsel from making objections during a trial lest, by objecting, counsel be found to have consented, in advance, to a mistrial order. Finally, I think the part of the defendant's objections played in leading to the mistrial order in the present case has been overemphasized in the court's opinion.[4]

As to the contention that consent may be implied from appellant's failure to object to the mistrial order, similar contentions were made and rejected in *Himmelfarb* v.

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[4] My colleagues refer to the defense's "continuous formal objections." This is misleading. At the morning session only did the defense interpose frequent objections. The first government witness, the shipper's traffic manager, was then testifying. Primarily these objections were directed to the admissibility of certain bills of lading. The district judge consistently overruled the defense, and the frequency of the objections was caused in part from the district judge's admonition to the defense to preserve this point. The district judge did not display notable impatience with the conduct of the Assistant United States Attorney or rule favorably to the defense until the abbreviated testimony of the third and fourth government witnesses, the two FBI agents, who testified in the afternoon. The district judge's displeasure with the trial conduct of the Assistant United States Attorney during their examination, a displeasure that I join my colleagues in being unable to account for, was not instigated by defense counsel, whose role during this portion of the trial was entirely passive. The trial record discloses that neither counsel anticipated the course so suddenly taken and that the withdrawal of the juror must have been as much of a surprise to defense counsel as it was to the Assistant United States Attorney.

United States, 175 F. 2d 924, 931-32 (9 Cir. 1949), *cert. denied*, 338 U. S. 860; *Ex parte Glenn*, 111 Fed. 257, 259 (N. D. W. Va. 1901), *rev'd on other grounds*, 189 U. S. 506; *United States* v. *Watson*, 28 Fed. Cases No. 16,651 (SDNY 1868). Under different circumstances than here present one court may have implied consent from a failure to object to a mistrial order. In *Scott* v. *United States*, 202 F. 2d 354 (D. C. Cir. 1952), *cert. denied*, 344 U. S. 879, 881, during the absence of the jury but in the presence of the defendant and his attorney, the trial judge stated he had decided to declare a mistrial. The jury was then called back into the courtroom and the order announced. During this time no objection was made. In the present case, however, the possibility of a mistrial had not been suggested until almost immediately before the district judge angrily ordered a juror discharged. The suddenness and vehemence of the order renders it highly unrealistic for us to imply consent here from appellant's failure to protest.

I would reverse with directions to dismiss the information.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 262—October Term, 1959.

(Petition filed August 5, 1960 Decided August 18, 1960.)

Docket No. 26048

UNITED STATES OF AMERICA,

Appellee,

—v.—

DANTE EDWARD GORI,

Defendant-Appellant.

Before:

LUMBARD, *Chief Judge*, and

CLARK, WATERMAN, MOORE, and FRIENDLY, *Circuit Judges.*

On Petition of Appellant for Rehearing

JEROME LEWIS, Brooklyn, N. Y., *for appellant.*

PER CURIAM:

On the merits of this appeal we find nothing to add to the discussions already had. Appellant, however, objects to the procedure *in banc* followed here and claims a right of oral argument. This is a point we should discuss, since

counsel generally should be apprised of our procedure so far as we have developed it. There is of course nothing secret as to our processes of advancing a case to the point of adjudication.

We have recently adopted our Rule 25(b) dealing with petitions for rehearing. This reads as follows:

> "(b) *Disposition.* Any petition for rehearing shall be addressed to the court as constituted in the original hearing. It shall be disposed of by the court as so constituted unless a majority of said court or any active judge of this court, either from a suggestion by petitioner or *sua sponte,* shall be of the opinion that the case should be reheard in banc, in which event the Chief Judge shall cause that issue to be determined by the active judges of this court. Rehearing, whether by the court as constituted in the original hearing or in banc, shall be without oral argument and upon the papers then before the court, unless otherwise ordered." (Eff. April 25, 1960.)

But additionally the court reserves the right, as the statute, 28 U. S. C. §46(c), provides, to proceed *in banc* whenever a majority of the active judges think such course in the interest of justice and so vote. This necessarily involves the exercise of discretion in each particular case and we have kept formal rules to a minimum. So when the procedure *in banc* has been voted, we have proceeded to decision on only the original papers, *McWeeney* v. *New York, N. H. & H. R. Co.*, 2 Cir., July 29, 1960; *Sperry Rand Corp.* v. *Bell Telephone Laboratories,* 2 Cir., 272 F. 2d 29; *Mueller* v. *Rayon Consultants,* 2 Cir., 271 F. 2d 591; *Reardon* v. *California Tanker Co.,* 2 Cir., 260 F. 2d 369, 375, certiorari denied *California Tanker Co.* v. *Reardon,* 359 U. S. 926;

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F. & M. Schaefer Brewing Co. v. *United States*, 2 Cir., 236 F. 2d 889, reversed *United States* v. *F. & M. Schaefer Brewing Co.*, 356 U. S. 227, or on the mere filing of additional briefs, *American-Foreign S.S. Corp.* v. *United States*, 2 Cir., 265 F. 2d 136, 144, vacated and remanded *United States* v. *American-Foreign S.S. Corp.*, 80 S. Ct. 1336; *In re Lake Tankers Corp.*, 2 Cir., 235 F. 2d 783, affirmed *Lake Tankers Corp.* v. *Henn*, 354 U. S. 147, or after full oral argument, *Pugach* v. *Dollinger*, 2 Cir., 277 F. 2d 739, certiorari granted 80 S. Ct. 1614; *United States* v. *Coppola*, 2 Cir., May 20, 1960; *U. S. ex rel. Marcial* v. *Fay*, 2 Cir., 247 F. 2d 662, certiorari denied *Fay* v. *U. S. ex rel. Marcial*, 355 U. S. 915; *U. S. ex rel. Roosa* v. *Martin*, 2 Cir., 247 F. 2d 659; *United States* v. *Apuzzo*, 2 Cir., 245 F. 2d 416, certiorari denied *Apuzzo* v. *United States*, 355 U. S. 831; and *United States* v. *Santore*, not yet decided. Thus we have no set rule in this regard, but are guided by what we conclude are the needs of a particular case.

These various cases presented all the questions here adverted to, including the supersession of retired or visiting judges by a court comprised of only the active judges. As appears above, the Supreme Court passed upon many of the cases in their substantive aspects, but without raising any question as to the procedure. Petitioner has no absolute right to oral argument; where, as here appeared, the researches of the court and its staff had proceeded beyond that disclosed in the briefs of counsel, further briefs and oral argument would have been a barren formalism without advantage to the court and counsel and a waste of time for all concerned.

Petition denied.